

The Appeals Board has considered the record and adopted the stipulations contained in the Award. Additionally, at oral argument, the parties agreed that the issues dealing with whether claimant suffered accidental injury arising out of and in the course of

his employment had been resolved as respondent had stipulated to those issues in its brief to the Administrative Law Judge and to the Board. Additionally, the parties stipulated that the dispute regarding whether the Administrative Law Judge had properly computed the award had been resolved and was no longer before the Board for consideration.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Was claimant's accidental injury of August 10, 1998, a temporary aggravation of claimant's preexisting conditions which would require respondent to pay only temporary total disability benefits and provide medical treatment necessary to cure and relieve claimant of the results of that accident?
- (3) Did claimant suffer subsequent injuries which would relieve respondent of any liability after September 14, 1999?
- (4) Did claimant's decision to voluntarily quit his employment with Boeing, while working in an accommodated position at a comparable wage, eliminate claimant's entitlement to a work disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds the Award of the Administrative Law Judge should be modified to award claimant temporary total disability compensation and medical treatment for a temporary aggravation of a preexisting condition from the accident of August 10, 1998.

Claimant has a long history of back problems associated with various employments. He suffered a back injury in January 1996 while working for Sulnel Company while lifting. He missed approximately a month of work and was provided medical treatment.

Claimant later went to work for Boggs Sign Company and, on March 13, 1997, fell from a 12-foot ladder, landing on his buttocks and back. Claimant was off work for an extended period of time after that injury. As of April 16, 1997, claimant continued receiving treatment from the Wichita Clinic and was restricted as a result of the earlier accidents.

On June 16, 1997, claimant received a full release from Thomas W. Kneidel, M.D., to return to work on June 17, 1997. This release was provided to respondent Boeing Company. As a result, claimant began working for respondent on July 31, 1997.

Claimant testified that his problems had resolved and he was asymptomatic prior to the August 10, 1998, accident at Boeing. However, the medical evidence in the record

contradicts claimant's testimony. Claimant was receiving treatment from his chiropractor, Patrick J. Carman, D.C., as late as July 10, 1998. At that time, claimant indicated he was having additional flare-ups in his low back, with the chiropractic reports showing claimant's problems at the L4-5 level.

On August 10, 1998, while working for respondent, claimant suffered an injury to his low back while lifting a trash can. Claimant describes this injury as significant. Claimant did notify his supervisor of the condition and was provided treatment with Ely Bartal, M.D. Dr. Bartal continued treating claimant conservatively, although claimant was administered an epidural injection in September of 1998. As of October 12, 1998, claimant advised Dr. Bartal he was doing much better, with his discomfort level being only mild and limited to the lumbosacral area. The radiculopathy in the claimant's legs had disappeared. Dr. Bartal returned claimant to work, restricting him from bending and twisting. As of November 12, 1998, Dr. Bartal found claimant to experience only occasional spasm when he performed heavy lifting but, otherwise, claimant was significantly improved. He was returned to work with no restrictions, to return on a PRN basis. Dr. Bartal felt claimant suffered no disability as a result of that injury of August 10, 1998.

Claimant was referred to orthopedic surgeon Robert L. Eyster, M.D., in January 1999 with ongoing back complaints. Dr. Eyster diagnosed degenerative disc disease consistent with claimant's history. Dr. Eyster treated claimant conservatively over a period of three months, with claimant's symptoms improving through March 17, 1999. He did recommend continued restrictions for claimant's work and assessed claimant a 5 percent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He felt the impairment was based upon claimant's degenerative changes which he found to be a longstanding problem. Dr. Eyster opined there was no permanent impairment resulting from the August 10, 1998, accident. Dr. Eyster's opinion was, in part, based upon a review of MRI films performed on June 10, 1997, and September 25, 1998. After comparing the MRI films and finding the MRI films were basically the same, he concluded that the August 10, 1998, incident caused only a temporary aggravation of claimant's underlying degenerative disc condition.

Claimant was referred by his attorney to Pedro A. Murati, M.D., for an independent examination on June 14, 1999. Dr. Murati assessed claimant a 10 percent impairment based upon the AMA Guides, Fourth Edition. He felt that the August 10, 1998, incident was an aggravation, resulting in additional impairment to claimant's low back. Dr. Murati, however, was not provided all of the relevant medical records and, therefore, could not give an objective opinion. In particular, the MRI reports used by Dr. Eyster were not provided. Dr. Murati acknowledged they would have been helpful in determining whether claimant had suffered any lesion, damage or change in the physical structure of his back as a result of the August 10, 1998, accident.

In workers compensation litigation, it is claimant's burden to prove his entitlement to the benefits requested by a preponderance of the credible evidence. K.S.A. 1998 Supp.

44-501 and K.S.A. 1998 Supp. 44-508(g). In this instance, the Appeals Board finds the medical opinions of Drs. Eyster and Bartal, as well as the records of Patrick J. Carman, D.C., to be persuasive. The medical reports convince the Board that claimant's ongoing back problems are a longstanding, chronic condition which, as claimant describes it, waxes and wanes depending upon the level of activity. The medical reports of both Dr. Bartal and Dr. Eyster support a finding that claimant's August 10, 1998, accident with respondent was a temporary aggravation of his ongoing preexisting problems. Additionally, claimant suffered injuries in September 1999 while working for Bartel Construction and when falling off a curb at his home. These accidents, according to the testimony of Dr. Eyster, would more likely be the direct cause of any ongoing medical symptoms or problems to claimant's low back after September 1999.

The Appeals Board, therefore, finds that the accident of August 10, 1998, resulted in a temporary aggravation of claimant's ongoing, chronic back problems and did not result in permanent injury. Accordingly, respondent's liability is limited to the payment of temporary total disability compensation and to the providing of reasonable and necessary medical care to relieve claimant of the symptoms of that accident.

This finding renders moot the issues dealing with claimant's termination of employment from respondent and claimant's entitlement to permanent partial disability benefits based upon either a functional impairment or a work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 8, 2001, should be, and is hereby, modified, and an award is granted in favor of the claimant, Mark A. Apel, and against the respondent, The Boeing Company, and its insurance carrier, Insurance Company State of Pennsylvania, for an accidental injury on August 10, 1998. Claimant is entitled to 3 weeks temporary total disability compensation at the rate of \$366 per week totaling \$1,098. Claimant is further entitled to medical care which is reasonable and necessary to cure claimant from the effects of the August 10, 1998, accident.

Claimant's attorney fees are approved insofar as they do not contravene the provisions of K.S.A. 1998 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Ireland Court Reporting, Inc.
Transcript of Regular Hearing

\$731.60

Harper & Associates	
Deposition of Pedro A. Murati, M.D.	\$392.60

Deposition Services	
Deposition of Robert L. Eyster, M.D.	\$239.10
Deposition of Karen Weaver	Unknown

IT IS SO ORDERED.

Dated this ____ day of August, 2001.

BOARD MEMBER

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DISSENT

I respectfully disagree with the majority and find that claimant more likely than not sustained permanent injury while working for respondent. In reaching its conclusion, the majority has completely discounted claimant's testimony.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Kim R. Martens, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director